

OFFICE OF THE GENERAL COUNSEL
Division of Operations-Management

MEMORANDUM OM 05-77

June 20, 2005

TO: All Regional Directors, Officers-in-Charge,
and Resident Officers

FROM: Richard A. Siegel, Associate General Counsel

SUBJECT: Appeal Language in Dismissal Letters

In order to more clearly set forth the procedures regarding the appeal process before the Office of Appeals, two changes have been made to the standard appeal language in dismissal and Collyer deferral letters. Pursuant to the postmark rule, the Office of Appeals accepts as timely an appeal that is postmarked no later than the day before the due date. However, the proviso to Section 102.111(b) of the Board's Rules and Regulations states that the postmark rule cannot apply to "requests for extensions of time to file any document for which such an extension may be granted." Therefore, the postmark rule does not apply to requests for extensions of time to file an appeal. To make this clear to the parties, the language has been revised in the paragraph in dismissal and Collyer deferral letters subtitled "*Extension of Time to File Appeal*" as follows:

Extension of Time to File Appeal: Upon good cause shown, the General Counsel may grant you an extension of time to file the appeal. You may file a request for an extension of time to file by mail, facsimile transmission, or through the Internet. The fax number is (202) 273-4283. Special instructions for requesting an extension of time over the Internet are set forth in the attached Access Code Certificate. While an appeal will be accepted as timely filed if it is postmarked no later than one day prior to the appeal due date, this rule does not apply to requests for extensions of time. A request for an extension of time to file an appeal **must be received** on or before the original appeal due date. A request that is postmarked prior to the appeal due date but received after the appeal due date will be rejected as untimely. Unless filed through the Internet, a copy of any request for extension of time should be sent to me.

Secondly, the General Counsel has had a discretionary policy of releasing to the parties, upon request, position statements submitted to the Office of Appeals while the appeal is pending.¹ In addition, the General Counsel will not accept any limitations on the use of any appeal position statements or evidence

¹ The provision of these documents is subject to appropriate redactions. See FOIA Manual (Procedural Section pp. 43-44).

Page Two

in support thereof. To ensure that all parties are aware of this policy, the following paragraph has been added to the standard language in Regional Office dismissal and Collyer deferral letters immediately after the paragraph subtitled "*Appeal Contents*".

Confidentiality/Privilege: Please be advised that we cannot accept any limitations on the use of any appeal statement or evidence in support thereof provided to the Agency. Thus, any claim of confidentiality or privilege cannot be honored, except as provided by the FOIA, 5 U.S.C. 552, and any appeal statement may be subject to discretionary disclosure to a party upon request during the processing of the appeal. In the event the appeal is sustained, any statement or material submitted may be subject to introduction as evidence at any hearing that may be held before an administrative law judge. Further, we are required by the Federal Records Act to keep copies of documents used in our case handling for some period of years after a case closes. Accordingly, we may be required by the FOIA to disclose such records upon request, absent some applicable exemption such as those that protect confidential source, commercial/financial information or personal privacy interests (e.g., FOIA Exemptions 4, 6, 7(C) and 7(D), 5 U.S.C. § 552(b)(4), (6), (7)(C), and (7)(D)). Accordingly, we will not honor any requests to place limitations on our use of appeal statements or supporting evidence beyond those prescribed by the foregoing laws, regulations, and policies.

Please ensure that these changes are made to your dismissal and Collyer deferral letters. In addition, we have attached the appropriate revised pages for inclusion in the Unfair Labor Practice (ULP) Casehandling Manual. These revisions will also be made to this Manual on the Agency's website (www.nlr.gov) as well as on the Agency's intranet.

If you have any questions regarding this memorandum, please contact your AGC or Deputy or the undersigned.

/s/
R.A.S.

Attachments

cc: NLRBU
Release to the Public

MEMORANDUM OM 05-77

10118–10123 DEFERRALS, WITHDRAWALS, DISMISSALS, AND APPEALS

10118 Deferrals

Under certain circumstances, it may be appropriate for a Regional Director to defer making a determination on the merits of a charge pending the outcome of proceedings on related matters. Such matters may be pending in the parties' contractual grievance procedure or before the Agency or other Federal, State, or local agencies or courts. Whenever a Regional Director decides to defer action on a case, all parties should be notified of that decision and the basis for it.

10118.1 Deferral to Contractual Grievance Procedure

Upon a determination of arguable merit, a Regional Director generally will be required to defer a charge to an available grievance procedure. If the charging party fails to process the ULP issue through the grievance procedure, deferral will generally not be appropriate and dismissal of the charge will be required. Deferral is generally not appropriate in certain circumstances, such as:

- Where the charge alleges a violation of Section 8(a)(4). *Food & Commercial Workers Local 1776*, 325 NLRB 908 (1998).
- Where the charge alleges a party has failed to supply information in violation of Section 8(a)(5) or 8(b)(3). *Clarkson Industries*, 312 NLRB 349, 353 (1993).
- Where the charged party's defense is not reasonably based on an interpretation of the collective-bargaining agreement. *Oak Cliff-Golman Baking Co.*, 202 NLRB 614, 616–617 (1973). (But see GC Memo 02-05 regarding collection cases.)
- Where the case involves the resolution of unit determination or other representation type issues. *St. Mary's Medical Center*, 322 NLRB 954 (1997).

(a) *Collyer Deferral*: Under the Board's policy set forth in *Collyer Insulated Wire*, 192 NLRB 837 (1971), and *United Technologies Corp.*, 268 NLRB 557 (1984), certain charges must be deferred to the contractual grievance procedure if the conduct is cognizable under the grievance procedure, the grievance procedure culminates in final and binding arbitration and the charged party waives all timeliness defenses to the grievance. The Board's policy and the procedures implemented in furtherance of this policy by the General Counsel are complex. Thus, current Board decisions, Advice memos, Appeals memos, and OM and GC memos should be consulted as needed. See generally General Counsel's Memorandum, Arbitration Deferral Policy under *Collyer*— Revised

Guidelines, May 10, 1973 (Deferral memorandum). Also see Pattern for *Collyer* Deferral letter at Sec. 10118.6.

(b) *Dubo Deferral*: Where a deferral under *Collyer* is inappropriate, the Regional Office may, in appropriate circumstances, defer a charge pursuant to the Board's decision in *Dubo Mfg. Corp.*, 142 NLRB 431 (1963). See generally GC Memo 79-36.

Under the Board's *Dubo* policy, unlike the *Collyer* policy, a charging party is not required to utilize a grievance procedure or face dismissal of its charge and is not entitled to appeal the *Dubo* deferral to the General Counsel. Thus, the Regional Office will defer under *Dubo* only if the charging party has initiated and continues to process a grievance involving the same issue. See General Counsel's Memorandum, Arbitration Deferral Policy under *Collyer* - Revised Guidelines, May 10, 1973 at page 38.

10118.2 Review Following Arbitration

Following issuance of an arbitration award, the Regional Office should determine whether the award meets the Board's standards as set forth generally in *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), and *Olin Corp.*, 268 NLRB 573 (1984). If the award meets the Board's standards, the charge should be dismissed, absent withdrawal. If the award does not meet the standards, the Regional Office should not defer to the award and should proceed to complete the investigation.

10118.3 Review Following Grievance Adjustments

Following an adjustment of a grievance, the Regional Office may, in appropriate circumstances, dismiss the charge, absent withdrawal, based on the grievance adjustment. See generally *Catalytic, Inc.*, 301 NLRB 380 (1991); *Alpha Beta Co.*, 273 NLRB 1546 (1985).

10118.4 Administrative Deferral

A Regional Office may postpone determination of a ULP charge due to the pendency of closely related matters in other proceedings. In these circumstances, the Regional Office should notify the parties of such decision and the basis for it. Although the Regional Office will normally consider the disposition of the related matter in its eventual determination, the Regional Office is not generally required to defer to the result in the related matter, except for controlling General Counsel determinations or Board decisions. Administrative deferral of a charge may be appropriate in the following circumstances:

(a) *Other Charges*: The Regional Office may postpone determination where the outcome of a closely related ULP charge may affect the disposition of the charge to be deferred. Common circumstances include cases pending administrative appeal and where complaint has issued.

(b) *Representation Cases*: The Regional Office may postpone determination of a ULP charge where the disposition of representation cases before the Regional Office or the Board may impact significant issues raised in the ULP case. Such issues may include supervisory status, appropriate unit or unit clarification issues.

(c) *Other Government Agencies and Courts*: The Regional Office may postpone making a determination of a ULP case where the outcome of a closely related matter pending before other Federal, State, or local Government agencies may significantly impact the disposition of the case to be deferred. For examples, see Sec. 10070. See also Sec. 10118.5.

10118.5 Periodic Review of Status of Deferred Cases

In order to determine whether deferral remains appropriate, the Regional Office should, on a quarterly basis, ascertain from the parties the status of the proceedings to which the Regional Office has deferred. Upon resolution of the related proceedings, the Regional Office must promptly review the disposition of the related proceedings and take whatever action is appropriate.

10118.6 Pattern for Collyer Deferral Letter

The following pattern should be used for deferral under *Collyer*.

Collyer Deferral Letter

[Charging Party and Charged Party]

Re: [Case Name]
[Case Number]

Appropriate Salutation:

The Region has carefully considered the charge filed against [Charged Party name] alleging it violated the National Labor Relations Act. As explained below, I have decided that further proceedings on that charge should be handled in accordance with the Board's deferral policy.

Deferral Policy: The Board's deferral policy provides that this Agency withhold making a final determination on certain unfair labor practice charges when a grievance involving the same issue can be processed under the grievance/arbitration provisions of the applicable contract. *Collyer Insulated Wire*, 192 NLRB 837 (1971), and *United Technologies Corp.*, 268 NLRB 557 (1984). This policy is based, in part, on the preference that the parties should resolve certain issues through their contractual grievance procedure in order to achieve a prompt, fair and effective settlement of their dispute. Therefore, if an employer agrees to waive contractual time limits and process the related grievance through arbitration if necessary, the Regional Office will defer the charge. However, this policy requires that a charge be dismissed if the charging party thereafter fails to promptly file and attempt to process a grievance on the subject matter of the charge.

Decision to Defer: Based on our investigation, I am deferring further proceedings on [(the charge) or (that portion of the charge described below)] to the grievance/arbitration process for the following reasons:

1. **The charge alleges:** [Describe allegations being deferred.]
2. **The Employer and the Union have a collective-bargaining agreement currently in effect that provides for final and binding arbitration.**
3. **The Employer is willing to process a grievance concerning the above allegations in the charge and will arbitrate the grievance if necessary. The Employer has also agreed to waive any time limitations in order to ensure that the arbitrator addresses the merits of the dispute.**
4. Since the above allegations in the charge appear to be covered by certain provisions of the collective-bargaining agreement, it is likely that such allegations may be resolved through the grievance/arbitration procedure.

Further Processing of the Charge: As explained below, while the charge is deferred, the Region will monitor the processing of the grievance and, under certain circumstances, will resume processing the charge.

Charging Party's Obligation: Under the Board's *Collyer* deferral policy, the Charging Party has an affirmative obligation to file a grievance, if a grievance has not already been filed. If the Charging Party fails either to promptly file or submit the grievance to the grievance/arbitration process, or declines to have the grievance arbitrated if it is not resolved, I will dismiss the charge.

[Note: If charge is filed by an individual, add the following paragraph.]

Union/Employer Conduct: If the Union or Employer fails to promptly process the grievance under the grievance/arbitration process; declines to arbitrate the grievance if it is not resolved; or if a conflict develops between the interests of the Union and Charging Party, I may revoke deferral and resume processing of the charge.

Charged Party's Conduct: If the Charged Party prevents or impedes resolution of the grievance, raises a defense that the grievance is untimely filed or refuses to arbitrate the grievance, I will revoke deferral and resume processing of the charge.

Inquiries and Requests for Further Processing: Approximately every 90 days, the Regional Office will ask the parties about the status of this dispute to determine if the dispute has been resolved and whether continued deferral is appropriate. However, I will accept and consider at any time requests and supporting evidence submitted by any party to this matter for dismissal of the charge, for continued deferral of the charge or for issuance of a complaint.

Notice to Arbitrator Form: If the grievance is submitted to an arbitrator, please sign and submit to the arbitrator the enclosed "Notice to Arbitrator" form to ensure that the Region receives a copy of an arbitration award when the award is sent to the parties.

Review of Arbitrator's Award: If the grievance is arbitrated, the Charging Party may request that this office review the arbitrator's award. The request must be in writing and addressed to me. The request should discuss whether the arbitration process was fair and regular, whether the unfair labor practice allegations in the charge were considered by the arbitrator, and whether the award is clearly repugnant to the Act. Further guidance on the nature of this review is

provided in *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), and *Olin Corp.*, 268 NLRB 573 (1984).

Charging Party's Right to Appeal: The National Labor Relations Board Rules and Regulations permit the Charging Party to obtain a review of this action by filing an appeal with the General Counsel of the National Labor Relations Board. If the Charging Party wishes to file an appeal, please note the following:

Appeal Due Date: The appeal must be received by the General Counsel in Washington, DC by the close of business at 5:00 p.m. (EST or EDT, as appropriate) on [14 days from issuance]. However, if the appeal is mailed, it will be considered timely if it is postmarked no later than one day before the due date. The appeal may not be filed by facsimile transmission or through the Internet.

Extension of Time to File Appeal: Upon good cause shown, the General Counsel may grant you an extension of time to file the appeal. You may file a request for an extension of time to file by mail, facsimile transmission, or through the Internet. The fax number is (202) 273-4283. Special instructions for requesting an extension of time over the Internet are set forth in the attached Access Code Certificate. While an appeal will be accepted as timely filed if it is postmarked no later than one day prior to the appeal due date, this rule does not apply to requests for extensions of time. A request for an extension of time to file an appeal must be received on or before the original appeal due date. A request that is postmarked prior to the appeal due date but received after the appeal due date will be rejected as untimely. Unless filed through the Internet, a copy of any request for extension of time should be sent to me.

Appeal Contents: The Charging Party is encouraged to submit a complete statement setting forth the facts and the reasons why it believes the decision to defer the charge was incorrect. However, the enclosed Appeal Form (NLRB-4767) by itself will be treated as an appeal if timely filed upon the General Counsel and me.

Confidentiality/Privilege: Please be advised that we cannot accept any limitations on the use of any appeal statement or evidence in support thereof provided to the Agency. Thus, any claim of confidentiality or privilege cannot be honored, except as provided by the FOIA, 5 U.S.C. 552, and any appeal statement may be subject to discretionary disclosure to a party upon request during the processing of the appeal. In the event the appeal is sustained, any statement or material submitted may be subject to introduction as evidence at any hearing that may be held before an administrative law judge. Further, we are required by the Federal Records Act to keep copies of documents used in our case handling for some period of years after a case closes. Accordingly, we may be required by the FOIA to disclose such records upon request, absent some applicable exemption such as those that protect confidential source, commercial/financial information or personal privacy interests (e.g., FOIA Exemptions 4, 6, 7(C) and 7(D), 5 U.S.C. § 552(b)(4), (6), (7)(C), and (7)(D)). Accordingly, we will not honor any requests to place limitations on our use of appeal statements or supporting evidence beyond those prescribed by the foregoing laws, regulations, and policies.

Address for Appeal: The appeal should be sent to the General Counsel of the National Labor Relations Board, Office of Appeals, 1099 – 14th Street, N.W., Washington, D.C. 20570. A copy of the appeal should be sent to me.

Notice to Other Parties of Appeal: The Charging Party should notify the other party(ies) to the case that an appeal has been filed. Therefore, at the time the appeal is sent to the General Counsel, please

complete the enclosed Appeal Form (NLRB-4767) and send one copy of the form to all parties whose names and addresses are set forth in this letter.

Very truly yours,

Regional Director

Enclosures

cc: General Counsel, Office of Appeals

10120 Withdrawals

A charging party may submit a request to withdraw an unfair labor practice charge or any portion thereof at any time. However, the Regional Director has discretion whether to approve the withdrawal request. Upon receipt of a withdrawal request, the Board agent, with appropriate supervision, should promptly prepare and submit to the Regional Director a recommendation regarding approval of the withdrawal.

10120.1 Unsolicited Withdrawals

The charging party may initiate the withdrawal of the entire charge or any portion of it. The Agency's withdrawal request form may be used to request withdrawal but any unequivocal written or, under certain circumstances, oral expression of a desire to withdraw is sufficient.

When the charging party makes an unsolicited request to withdraw the charge or a portion of it, the Board agent should ascertain the reasons for withdrawal, which should be included in the Board agent's recommendation to the Regional Director.

Although the Regional Director otherwise has discretion to approve a withdrawal, where complaint has been authorized by the Office of Appeals or Division of Advice, clearance should be obtained from the appropriate branch.

10120.2 Solicited Withdrawals

Following a Regional Office determination to not issue complaint, the Board agent should give the charging party the opportunity to withdraw any allegations of the charge determined to be non-meritorious. The Board agent should advise the charging party orally or otherwise of the reasons for the

Regional Office's determination in detail and that, unless the charge is withdrawn by a reasonable deadline, the charge will be dismissed. If the charging party declines to withdraw, the charging party must be informed that a detailed explanation of the reasons for dismissal will be included in the dismissal letter, commonly referred to as a long-form dismissal, unless the charging party requests that the detailed explanation be excluded. The charging party must also be informed that the charged party will receive a copy of any dismissal letter. See also Secs. 10122.1–10122.3.

10120.3 Oral Withdrawal Requests

Regional Directors are authorized to approve oral withdrawal requests from any charging party. However, if there are potential 10(b) problems and/or the Regional Office has concerns about whether the oral withdrawal request should be relied upon, the Regional Office may require that the request be in writing. Absent such concerns, an oral withdrawal request generally should be processed in the same manner as a written request.

10120.4 Adjusted Withdrawals

Whenever a charging party requests withdrawal of a potentially meritorious charge, the Board agent should ascertain if there was an adjustment of the underlying dispute after the charge was filed. If there has been such an adjustment, the Board agent should include the details of the resolution, particularly the amount of any backpay, in the recommendation regarding approval of the withdrawal. A closed case report should then be completed.

10120.5 Conditional Withdrawals

The Regional Office may also approve withdrawals conditioned on the charged party fulfilling its obligations under a non-Board adjustment. Sec. 10142.3.

10120.6 Positions of Other Parties

Upon receipt of a withdrawal request, it is unnecessary to ascertain the position of the charged party. However, the Board agent should contact and solicit the position of any alleged discriminates and other individuals or entities who may be adversely affected by approval of the request. The Regional Director should carefully consider the positions of such persons and all relevant circumstances in considering whether to approve the withdrawal of the charge. The Regional Director's discretion in this regard is governed by the standards set forth in *Independent Stave Co.*, 287 NLRB 740 (1987), and *Alpha Beta Co.*, 273 NLRB 1546 (1985).

10120.7 Refiling of Same Allegation

A closing of an unfair labor practice case pursuant to a withdrawal request constitutes a disposition of the issues without prejudice to filing a new charge over the same matter. The filing of a new charge does not constitute a reopening of the withdrawn charge. Moreover, the 10(b) period is not tolled by the initial

filing and will apply with respect to any refiling of the same allegations. Sec.
10052.2.

10120.8 Withdrawal Request after Dismissal

If a withdrawal request is received after the charge has been dismissed but before the date the appeal must be received, the dismissal should be revoked and the withdrawal request approved. If a withdrawal request is received while the case is pending on appeal, the Regional Director should consult with the Office of Appeals before revoking the dismissal and approving the withdrawal. See Pattern at Sec. 10122.14(c).

10120.9 Notification to Parties

On approval of a withdrawal request, the Regional Office must notify all parties by letter that the charge, or a portion thereof, with the Regional Director's approval, has been withdrawn. No reasons for the withdrawal of the approval should be given in the notification.

On the other hand, if the charging party requests withdrawal before service of the charge, the Regional Office may approve the withdrawal without service of the charge or any other notification to the parties.

10122 Dismissals/Appeals

Following a determination not to issue complaint and absent withdrawal of the charge by the charging party, the Regional Director will, except for certain CD cases, dismiss the charge, which may be appealed to the General Counsel. For the disposition of CD charges, see Secs. 10206–10220.

10122.1 Notification

Having first given the charging party an opportunity to withdraw, as set forth in Sec. 10120.2, the Regional Director should issue a dismissal letter by regular mail to charging party, with a copy to the charged party, providing notification of the determination not to issue complaint. The dismissal letter should contain a detailed explanation of the reasons for refusing to issue complaint, unless the charging party has specifically rejected the long-form dismissal, as described in Sec. 10122.2(a).

10122.2 Dismissal Letter

(a) *Long Form*: A long-form dismissal letter must provide a detailed summary of the basis for the Regional Office determination. A dismissal letter should be sufficient to permit the charging party to direct an appeal to the dispositive aspects of the dismissal and should not be merely a statement of the ultimate conclusion. Thus:

- The particular reason(s) for a determination should be set forth, e.g., the charging party was notified of the discipline on a specific date, more than 6 months before the filing of the charge.

- The material element of the charge that was found unsupported should be clearly identified, such as lack of evidence of disparate treatment or knowledge of union activity.
- When there are alternatives or multiple bases for disposition, they should all be listed, e.g., the alleged unilateral change was not material and substantial and, moreover, the union had waived its right to bargain over the issue.

See Pattern at Sec. 10122.14(a) for dismissal letter.

(b) *Short Form*: Where a detailed explanation has been rejected by the charging party, a short-form dismissal letter should issue which follows the pattern set forth at Sec. 10122.14(a) with the decision to dismiss language limited to a brief statement. Such a statement should be concise and based on specific grounds such as the following:

- Lack of cooperation by charging party
- Lack of jurisdiction
- Charge filed outside 10(b) period
- Insufficient evidence to establish a violation
- Formal proceedings will not effectuate the purposes of the Act (e.g., isolated unlawful conduct, policy determinations)

(c) *Merit Dismissal*: In certain circumstances, such as when an otherwise meritorious allegation is isolated and/or the remedy available does not warrant formal proceedings, a merit dismissal letter may be appropriate. See GC Memos 02-08 and 95-15 and OM 02-15. See Patterns at 10122.14(d) and (e).

10122.3 Service

The names and addresses of all interested parties and counsel who have entered appearances on their behalf during the investigation should be listed on the dismissal letter and copies mailed to such persons. At the time the dismissal letter is mailed to the parties, the Regional Office should electronically transmit the dismissal letter to the Office of Appeals.

10122.4 Appeal Rights

All dismissal letters must provide instructions for filing an appeal with the General Counsel and may include Form 4938 for this purpose. Normally, the charging party must be given 14 days in which to file an appeal. Sec. 102.19, Rules and Regulations. For computation of time periods, see Sec. 102.111, Rules and Regulations.

However, the charging party is given only 7 days in which to file an appeal when an 8(b)(7)(C) charge is dismissed and an expedited election is directed. Sec. 102.81(a), Rules and Regulations and Sec. 10232.2(c). The 7-day appeal period also applies to any other charges that are dismissed in connection with the 8(b)(7) proceeding. Sec. 102.81(c), Rules and Regulations.

All dismissal letters should include Form NLRB-4767, Appeal Form, and request that the person filing an appeal use such forms to notify the other parties. The General Counsel's acknowledgment of the filing of an appeal, as well as any ruling on a request for extension of time to file an appeal, will be served on all parties. Sec. 102.19, Rules and Regulations.

10122.5 Partial Dismissal

Where the Regional Office determines that only a portion of the charge lacks merit, the nonmeritorious allegations should be dismissed, absent withdrawal. In such situations, the partial dismissal letter should clearly identify those allegations being dismissed and provide the usual opportunity to file an appeal. This letter must also state that the remaining allegations are being retained for such further disposition as may be appropriate.

(a) *Complaint on Meritorious Allegations:* Although complaint may issue as to the meritorious allegations, if the partial dismissal is appealed, the hearing should not be held until after disposition of the appeal, absent unusual circumstances.

(b) *Settlement of Meritorious Allegations:* Although a settlement agreement may be entered into as to the meritorious allegations, approval of the settlement should be withheld until after the expiration of the time for filing an appeal or the disposition of an appeal.

10122.6 Countercharges

Countercharges involve circumstances arising out of the same situation where each party has filed a charge(s) against the other, e.g., 8(a)(5) and 8(b)(3) or 8(b)(7) and 8(a)(5) charges. Often the disposition of one charge affects the processing of the related countercharge. Therefore, where the Regional Office finds merit to one of the charges but dismisses the other, the issuance of complaint may be withheld until after the expiration of the time for filing an appeal or the disposition of an appeal.

10122.7 Extension of Time to File Appeal

On receipt of a copy of request for extension of time to file an appeal, the Regional Director should, if compelling circumstances exist, immediately advise the Office of Appeals if the Regional Office objects to granting the request and the basis for such objection. If the charge is partially dismissed, see Sec. 10122.5 for permissible action during the appeal period or while the appeal is pending.

10122.8

Regional Office Action Upon Receipt of Appeal

Upon receipt of an appeal, the Regional Office should carefully review the appeal and determine whether reconsideration of the dismissal or further investigation is warranted. If the appeal does not raise new issues or evidence, the Regional Office may so state and need not comment further regarding the appeal, unless it would be instructive to the Office of Appeals in its review. If the appeal raises issues or evidence the Regional Office has not previously considered, the Regional Office should analyze the new material in its comment on appeal. If the Regional Office concludes that the appeal raises issues requiring further investigation, the Office of Appeals should be notified and the investigation promptly completed. If the additional investigation leads the Regional Office to conclude that dismissal of the charge continues to be warranted, the Regional Office should prepare a written document memorializing that determination. Sec. 10068.2. The Regional Office should then note the results of its additional investigation in its comments on appeal. Before sending the Regional Office file to Appeals, the file should be examined to assure that memos and reports are accurate and legible and that the file contains all relevant information.

On the other hand, if the appeal or further investigation leads the Regional Office to conclude that allegations in the charge warrant complaint, it should telephonically or electronically notify the Office of Appeals, prior to revocation, of its intention to revoke the dismissal. The Regional Director should then revoke the dismissal letter and take appropriate action. See Pattern at Sec. 10122.14(b).

10122.9

Submission of Case File to Office of Appeals

The Regional Office should submit the case file to the Office of Appeals within 14 days of the Regional Office's receipt of the appeal. If the Regional Office is unable to submit the case file within 14 days, the Regional Office should forward a memo to Appeals explaining the reason for the delay and the estimated date of submission.

The Regional Office's transmittal memo should set forth the Impact Analysis category of the case and whether there are any related pending cases. In such circumstances, the case number, filing date and current status of such cases should be noted.

10122.10

Request for Expedited Processing of Appeal

Under certain circumstances, the Regional Office may request expedited processing of an appeal. The transmittal memo or the comment on appeal should set forth the basis for such request, such as:

- Trial is scheduled in a related case (include date of hearing)
- Complaint has issued on other allegations in the case pending before the Office of Appeals

- Unilateral settlement in a related case is pending approval or on appeal
- Charge is blocking a representation petition
- Related matters are currently pending before the Board (e.g., a report on objections) or
- Related picketing or other economic action continues

10122.11 Notification to Office of Appeals of New Developments

If, after the Regional Office sends the transmittal memo or comment to the Office of Appeals, a new related charge is filed or other relevant developments occur, a memo containing that information should be forwarded to Appeals. In such circumstances, the Regional Office should notify Appeals of any changes in the status of the new related charge during the pendency of the appeal. Notification may be made by telephone, facsimile, memorandum or electronically, depending on the urgency of the situation.

10122.12 Appeal Sustained

If the appeal is granted, the Regional Office should issue complaint or take other appropriate action directed by the Office of Appeals. While the Regional Director has the authority to settle according to existing guidelines, the Director should contact the Division of Operations-Management if there are questions regarding the appropriateness of accepting a particular settlement.

10122.13 Appeals Remanded to Regional Offices for Further Investigation

Upon remand by the Office of Appeals to the Regional Office for further investigation, the Regional Office should promptly conduct the investigation and return the remanded case to Appeals within 7 days after receipt. If the nature or extent of the investigation or a conflict with other pressing matters of a higher Impact Analysis category prevents prompt resubmission, the Regional Office should promptly notify Appeals of the reason for the delay and give an estimate of the additional time required. The information requested may be transmitted by telephone, facsimile, memorandum, or electronically.

10122.14 Patterns Related to Dismissals

(a) *Pattern for Dismissal of Charges:* The following pattern should be used for dismissal of an unfair labor practice charge. The normal appeal period is 14 days; see, however, Sec. 10122.4 for circumstances relating to Section 8(b)(7) in which the appeal period is reduced to 7 days.

[Charging Party]

Re: [Case Name]
[Case Number]

Appropriate Salutation:

The Region has carefully investigated and considered your charge against _____ alleging violations under Section 8 of the National Labor Relations Act.

Decision to Dismiss: Based on that investigation, I have concluded that further proceedings are not warranted, and I am dismissing your charge for the following reasons:

Your charge alleges [, among other things,] that [Briefly describe closely related allegations and reasons for dismissal in the same paragraph.]

Your charge also alleges that. . . .

Finally, your charge also alleges that. . . .

Your Right to Appeal: The National Labor Relations Board Rules and Regulations permit you to obtain a review of this action by filing an appeal with the General Counsel of the National Labor Relations Board. If you wish to file an appeal, please note the following:

Appeal Due Date: The appeal must be received by the General Counsel in Washington, D.C. by the close of business at 5:00 p.m. [EST or EDT, as appropriate] on [14 days from issuance]. However, if you mail the appeal, it will be considered timely if it is postmarked no later than one day before the due date. The appeal may not be filed by facsimile transmission or through the Internet.

Extension of Time to File Appeal: Upon good cause shown, the General Counsel may grant you an extension of time to file the appeal. You may file a request for an extension of time to file by mail, facsimile transmission, or through the Internet. The fax number is (202) 273-4283. Special instructions for requesting an extension of time over the Internet are set forth in the attached Access Code Certificate. While an appeal will be accepted as timely filed if it is postmarked no later than

one day prior to the appeal due date, this rule does not apply to requests for extensions of time. A request for an extension of time to file an appeal must be received on or before the original appeal due date. A request that is postmarked prior to the appeal due date but received after the appeal due date will be rejected as untimely. Unless filed through the Internet, a copy of any request for extension of time should be sent to me.

Appeal Contents: You are encouraged to submit a complete statement setting forth the facts and the reasons why you believe the decision to dismiss your charge was incorrect. However, the enclosed Appeal Form (NLRB-4767) by itself will be treated as an appeal if timely filed upon the General Counsel and me.

Confidentiality/Privilege: Please be advised that we cannot accept any limitations on the use of any appeal statement or evidence in support thereof provided to the Agency. Thus, any claim of confidentiality or privilege cannot be honored, except as provided by the FOIA, 5 U.S.C. 552, and any appeal statement may be subject to discretionary disclosure to a party upon request during the processing of the appeal. In the event the appeal is sustained, any statement or material submitted may be subject to introduction as evidence at any hearing that may be held before an administrative law judge. Further, we are required by the Federal Records Act to keep copies of documents used in our case handling for some period of years after a case closes. Accordingly, we may be required by the FOIA to disclose such records upon request, absent some applicable exemption such as those that protect confidential source, commercial/financial information or personal privacy interests (e.g., FOIA Exemptions 4, 6, 7(C) and 7(D), 5 U.S.C. § 552(b)(4), (6), (7)(C), and (7)(D)). Accordingly, we will not honor any requests to place limitations on our use of appeal statements or supporting evidence beyond those prescribed by the foregoing laws, regulations, and policies.

Address for Appeal: The appeal should be sent to the General Counsel of the National Labor Relations Board, Office of Appeals, 1099 14th Street, N.W., Washington, D.C. 20570. You should send a copy of the appeal to me.

Notice to Other Parties of Appeal: You should notify the other party(ies) to the case that an appeal has been filed. Therefore, at the time the appeal is sent to the General Counsel, please complete the enclosed Appeal Form (NLRB-4767) and send one copy of the form to all parties whose names and addresses are set forth in this letter.

Very truly yours,

Regional Director

**cc: Charged Party
Other Parties
General Counsel, Office of Appeals**

(b) Pattern for Revocation of Dismissal While Appeal is Pending:

[Charging Party]

Re: [Case Name]
[Case Number]

Appropriate Salutation:

By letter dated [date], I dismissed the charge [you/charging party] filed against [name of charged party]. On [date] [you/charging party] appealed the dismissal of your charge to the General Counsel.

Revocation of Dismissal: After further review, I have reconsidered my conclusion and have now determined that additional proceedings on [your/the] charge are warranted. In view of my reconsideration, on behalf of the General Counsel, I am informing you that [your/the] charge is being returned to the Regional Office for further processing. Since I have determined that further proceedings are

warranted on [your/the] charge, I am revoking my earlier dismissal of [your/the] charge.

[An opportunity to settle in absence of complaint can be set forth here.]

Very truly yours,

Regional Director

**cc: Charged Party
Other Parties
General Counsel, Office of Appeals**

(c) Pattern for Approval of Request to Withdraw Appeal and Charge:

[Charging Party]

Re: [Case Name]
[Case Number]

Appropriate Salutation:

By letter dated [date], I dismissed the charge [you/charging party] filed against [name]. On [date] you appealed the dismissal of your charge to the General Counsel. On [date] you requested to withdraw the charge in this matter.

Because of the pending appeal, [your/that] request to withdraw the charge is considered to be a request to withdraw both [your/the] appeal and the charge in this matter. Accordingly, on behalf of the General

Counsel, I approve [your/the] request to withdraw the appeal. I also approve [your/the] request to withdraw the charge in this matter.

Very truly yours,

Regional Director

**cc: Charged Party
Other Parties
General Counsel, Office of Appeals**

(d) Pattern for Merit Dismissal – Conditional Decision to Dismiss:

[Charging Party]

Re: [Case Name]
[Case Number]

Appropriate Salutation:

The Region has carefully investigated and considered your charge against _____ alleging violations under Section 8 of the National Labor Relations Act.

***Conditional Decision to Dismiss:* I have concluded that further proceedings on the arguably meritorious allegations disclosed by the investigation are not warranted at this time. For the reasons set forth below, I have conditionally decided to dismiss your charge 6 months from this date.**

Your charge alleges [Describe the arguably violative conduct.]

I have conditionally decided to dismiss because there were no prior meritorious unfair labor practice charges against the Charged Party within the past several years, and [Set forth additional circumstances which make the conditional decision to dismiss appropriate, such as:

- the conduct is isolated in nature; or

- there is no ongoing unlawful effect on an employee's terms and conditions of employment; or
- there is neither impact on other employees nor other accompanying violations which require a Board remedy; or
- the conduct has minor group impact; or
- the conduct is of limited duration.]

I intend to dismiss your charge 6 months from this date unless a new meritorious charge is filed within that time alleging that the Charged Party has engaged in other unfair labor practices that make dismissal of your charge inappropriate. Accordingly, I will hold your charge in abeyance for 6 months from the date of this letter. If a meritorious charge involving other unfair labor practices is filed against the Charged Party during that period, I will reconsider whether further proceedings on this charge are warranted.

Your Right to Appeal: The National Labor Relations Board Rules and Regulations permit you to obtain a review of this action by filing an appeal with the General Counsel of the National Labor Relations Board. If you wish to file an appeal, please note the following:

Appeal Due Date: The appeal must be received by the General Counsel in Washington, D.C. by the close of business at 5:00 p.m. [EST or EDT, as appropriate] on [14 days from issuance]. However, if you mail the appeal, it will be considered timely if it is postmarked no later than one day before the due date. The appeal may not be filed by facsimile transmission or through the Internet.

Extension of Time to File Appeal: Upon good cause shown, the General Counsel may grant you an extension of time to file the appeal. You may file a request for an extension of time to file by mail, facsimile transmission, or through the Internet. The fax number is (202) 273-4283. Special instructions for requesting an extension of time over the Internet are set forth in the attached Access Code Certificate. While an appeal will be accepted as timely filed if it is postmarked no later than one day prior to the appeal due date, this rule does not apply to requests for extensions of time. A request for an extension of time to file an appeal must be received on or before the original appeal due date. A request that is postmarked prior to the appeal due date but received after the appeal due date will be rejected as untimely. Unless filed

through the Internet, a copy of any request for extension of time should be sent to me.

Appeal Contents: You are encouraged to submit a complete statement setting forth the facts and the reasons why you believe the conditional decision to dismiss your charge was incorrect. However, the enclosed Appeal Form (NLRB-4767) by itself will be treated as an appeal if timely filed upon the General Counsel and me.

Confidentiality/Privilege: Please be advised that we cannot accept any limitations on the use of any appeal statement or evidence in support thereof provided to the Agency. Thus, any claim of confidentiality or privilege cannot be honored, except as provided by the FOIA, 5 U.S.C. 552, and any appeal statement may be subject to discretionary disclosure to a party upon request during the processing of the appeal. In the event the appeal is sustained, any statement or material submitted may be subject to introduction as evidence at any hearing that may be held before an administrative law judge. Further, we are required by the Federal Records Act to keep copies of documents used in our case handling for some period of years after a case closes. Accordingly, we may be required by the FOIA to disclose such records upon request, absent some applicable exemption such as those that protect confidential source, commercial/financial information or personal privacy interests (e.g., FOIA Exemptions 4, 6, 7(C) and 7(D), 5 U.S.C. § 552(b)(4), (6), (7)(C), and (7)(D)). Accordingly, we will not honor any requests to place limitations on our use of appeal statements or supporting evidence beyond those prescribed by the foregoing laws, regulations, and policies.

Address for Appeal: The appeal should be sent to the General Counsel of the National Labor Relations Board, Office of Appeals, 1099 14th Street, N.W., Washington, D.C. 20570. You should send a copy of the appeal to me.

Notice to Other Parties of Appeal: You should notify the other party(ies) to the case that an appeal has been filed. Therefore, at the time the appeal is sent to the General Counsel, please complete the enclosed Appeal Form (NLRB-4767) and send one copy of the form to all parties whose names and addresses are set forth in this letter.

Very truly yours,

Regional Director

**cc: Charged Party
Other Parties
General Counsel, Office of Appeals**

(e) *Pattern for Merit Dismissal Following Conditional Decision to Dismiss:*

[Charging Party]

Re: [Case Name]
[Case Number]

Appropriate Salutation:

The Region has carefully investigated and considered your charge against _____ alleging violations under Section 8 of the National Labor Relations Act.

Decision to Dismiss: On [date], I informed you of my intention to dismiss this charge in 6 months unless a new meritorious charge was filed within that time alleging that the Charged Party has engaged in other unfair labor practices that make dismissal of your charge inappropriate. No such charge has been filed. Accordingly, I have concluded that further proceedings are not warranted and I am dismissing your charge.

Your Right to Appeal: The National Labor Relations Board Rules and Regulations permit you to obtain a review of this action by filing an appeal with the General Counsel of the National Labor Relations Board. If you wish to file an appeal, please note the following:

Appeal Due Date: The appeal must be received by the General Counsel in Washington, D.C. by the close of business at 5:00 p.m. [EST or EDT, as appropriate] on [14 days from issuance]. However, if you mail the appeal, it will be considered timely if it is postmarked no later than one day before the due date. The appeal may not be filed by facsimile transmission or through the Internet.

Extension of Time to File Appeal: Upon good cause shown, the General Counsel may grant you an extension of time to file the appeal. You may file a request for an extension of time to file by mail, facsimile transmission, or through the Internet. The fax number is (202) 273-4283. Special instructions for requesting an extension of time over the Internet are set forth in the attached Access Code Certificate. While an appeal will be accepted as timely filed if it is postmarked no later than

one day prior to the appeal due date, this rule does not apply to requests for extensions of time. A request for an extension of time to file an appeal must be received on or before the original appeal due date. A request that is postmarked prior to the appeal due date but received after the appeal due date will be rejected as untimely. Unless filed through the Internet, a copy of any request for extension of time should be sent to me.

Appeal Contents: You are encouraged to submit a complete statement setting forth the facts and the reasons why you believe the decision to dismiss your charge was incorrect. However, the enclosed Appeal Form (NLRB-4767) by itself will be treated as an appeal if timely filed upon the General Counsel and me.

Confidentiality/Privilege: Please be advised that we cannot accept any limitations on the use of any appeal statement or evidence in support thereof provided to the Agency. Thus, any claim of confidentiality or privilege cannot be honored, except as provided by the FOIA, 5 U.S.C. 552, and any appeal statement may be subject to discretionary disclosure to a party upon request during the processing of the appeal. In the event the appeal is sustained, any statement or material submitted may be subject to introduction as evidence at any hearing that may be held before an administrative law judge. Further, we are required by the Federal Records Act to keep copies of documents used in our case handling for some period of years after a case closes. Accordingly, we may be required by the FOIA to disclose such records upon request, absent some applicable exemption such as those that protect confidential source, commercial/financial information or personal privacy interests (e.g., FOIA Exemptions 4, 6, 7(C) and 7(D), 5 U.S.C. § 552(b)(4), (6), (7)(C), and (7)(D)). Accordingly, we will not honor any requests to place limitations on our use of appeal statements or supporting evidence beyond those prescribed by the foregoing laws, regulations, and policies.

Address for Appeal: The appeal should be sent to the General Counsel of the National Labor Relations Board, Office of Appeals, 1099 14th Street, N.W., Washington, D.C. 20570. You should send a copy of the appeal to me.

Notice to Other Parties of Appeal: You should notify the other party(ies) to the case that an appeal has been filed. Therefore, at the time the appeal is sent to the General Counsel, please complete the enclosed Appeal Form (NLRB-4767) and send one copy of the form to all parties whose names and addresses are set forth in this letter.

Very truly yours,

Regional Director

cc: **Charged Party**
Other Parties
General Counsel, Office of Appeals

10123 Reopening of Dismissed or Withdrawn Cases

Pursuant to the General Counsel's authority under Section 3(d) of the Act, Regional Directors may reopen a case within the 10(b) period. In such circumstances, the Regional Director should issue a letter to all parties advising that the prior dismissal of the charge or the prior approval of the withdrawal request has been revoked and that the charge is reinstated.

10123.1 Cases After 10(b) Period

In certain limited circumstances, a timely filed charge that was dismissed or withdrawn may be reinstated after the expiration of the 10(b) period. Thus, a Regional Director may, in appropriate circumstances, revoke a dismissal or approval of a withdrawal, reopen a case for reconsideration and issue complaint regarding events occurring within 6 months of the date the charge was filed. Such circumstances include:

(a) *Fraudulent Concealment:* Where the charged party has fraudulently concealed evidence. *Kanakis Co.*, 293 NLRB 435 (1989); cf. *Brown & Sharpe Mfg. Co.*, 312 NLRB 444 (1993); *Morgan's Holiday Markets*, 333 NLRB No. 92 (2001).

(b) *Subterfuge in Non-Board Adjustments:* Where the charged party has fraudulently entered into a non-Board adjustment as a subterfuge to avoid its liability under the Act. *Norris Concrete Materials*, 282 NLRB 289 (1986).

(c) *Equitable Considerations*: Where equitable considerations exist, e.g., an error was made in an initial failure to assert jurisdiction. *Airport Connection*, 243 NLRB 1076 (1979).

In all circumstances other than those set forth above, the Regional Office must obtain authorization from the Division of Advice if reinstatement of the charge would occur outside the 10(b) period.

10123.2 After Appeal Filed or Denied

When an appeal is pending, the Regional Office should, prior to revocation, telephonically or electronically notify the Office of Appeals of its intention to revoke the dismissal. When the Regional Office's dismissal has been sustained on appeal, the Regional Office must obtain clearance from Appeals in order to revoke the dismissal. The reinstatement of such charges may not be utilized in order to permit withdrawal of those charges. Sec. 10122.8.

10123.3 Conditionally Withdrawn Cases

If the Regional Office determines that the charged party failed to comply with its obligations pursuant to a non-Board adjustment in which the charge has been withdrawn conditionally (Sec. 10120.5), the Regional Office should revoke approval of the conditional withdrawal and reinstate the charge.

decided to conduct an expedited election by secret ballot pursuant to Sections 8(b)(7)(C) and 9(c) of the Act and Section 102.77 of the Board's Rules and Regulations. This election will determine whether the employees in the unit covered by the petition want to be represented for purposes of collective bargaining by [name of union] [or (name of other interested unions)] pursuant to Section 9(c) of the National Labor Relations Act, or by no union.

Accordingly, a secret ballot election will be conducted as described in the enclosed Notice of Election among the employees in the following appropriate unit:

[Description of Unit]

Your cooperation will be appreciated.

Very truly yours,

Regional Director

Enclosure: Notice of Election

10236.4 Pattern 73, Dismissal of 8(b)(7)(C) Charge (When Regional Office Has Directed Expedited Election)

For discussion of this topic, see also Sec. 10232.2(c).

[Charging Party]

**Re: [Case Name]
Case [Number]**

Appropriate Salutation:

The Region has carefully investigated and considered your charge against [Charged Party name] alleging a violation of Section 8(b)(7)(C) of the National Labor Relations Act. The investigation disclosed that a timely valid representation petition has been

filed in Case ___-R___-_____ within a reasonable time from the commencement of the picketing involved in the charge.

Decision to Dismiss and Conduct Election: Section 8(b)(7)(C) of the Act permits a union to picket to obtain recognition if a representation petition is filed either before, or within a reasonable period of time of, such picketing. Therefore, I am dismissing your charge. Pursuant to the expedited election procedures of 8(b)(7)(C) and Section 102.77 of the Board's Rules and Regulations, I have separately directed an expedited election in Case ___-R___-_____.

Your Right To Appeal: The National Labor Relations Board Rules and Regulations permit you to obtain a review of this action by filing an appeal with the General Counsel of the National Labor Relations Board. However, filing an appeal will not stay the holding of the election. If you wish to file an appeal, please note the following:

Appeal Due Date: The appeal must be received by the General Counsel in Washington, DC by the close of business at 5:00 p.m. [EST or EDT, as appropriate] on [7 days from issuance]. However, if you mail the appeal it will be considered timely if it is postmarked no later than one day before the due date. The appeal may not be filed by facsimile transmission or through the Internet.

Extension of Time to File Appeal: Upon good cause shown, the General Counsel may grant you an extension of time to file the appeal. You may file a request for an extension of time to file by mail, facsimile transmission, or through the Internet. The fax number is (202) 273-4283. Special instructions for requesting an extension of time over the Internet are set forth in the attached Access Code Certificate. While an appeal will be accepted as timely filed if it is postmarked no later than one day prior to the appeal due date, this rule does not apply to requests for extensions of time. A request for an extension of time to file an appeal must be received on or before the original appeal due date. A request that is postmarked prior to the appeal due date but received after the appeal due date will be rejected as

untimely. Unless filed through the Internet, a copy of any request for extension of time should be sent to me.

Appeal Contents: You are encouraged to submit a complete statement setting forth the facts and the reasons why you believe the decision to dismiss your charge was incorrect. However, the enclosed Appeal Form (NLRB-4767) by itself will be treated as an appeal if timely filed upon the General Counsel and me.

Confidentiality/Privilege: Please be advised that we cannot accept any limitations on the use of any appeal statement or evidence in support thereof provided to the Agency. Thus, any claim of confidentiality or privilege cannot be honored, except as provided by the FOIA, 5 U.S.C. 552, and any appeal statement may be subject to discretionary disclosure to a party upon request during the processing of the appeal. In the event the appeal is sustained, any statement or material submitted may be subject to introduction as evidence at any hearing that may be held before an administrative law judge. Further, we are required by the Federal Records Act to keep copies of documents used in our case handling for some period of years after a case closes. Accordingly, we may be required by the FOIA to disclose such records upon request, absent some applicable exemption such as those that protect confidential source, commercial/financial information or personal privacy interests (e.g., FOIA Exemptions 4, 6, 7(C) and 7(D), 5 U.S.C. § 552(b)(4), (6), (7)(C), and (7)(D)). Accordingly, we will not honor any requests to place limitations on our use of appeal statements or supporting evidence beyond those prescribed by the foregoing laws, regulations, and policies.

Address for Appeal: The appeal should be sent to the General Counsel of the National Labor Relations Board, Office of Appeals, 1099 14th Street, NW, Washington, DC 20570. You should send a copy of the appeal to me.

Notice to Other Parties of Appeal: You should notify the other party(ies) to the case that an appeal has been filed. Therefore, at the time the appeal is sent to the General Counsel,

please complete the enclosed Appeal Form (NLRB-4767) and send one copy of the form to all parties whose names and addresses are set forth in this letter.

Very truly yours,

Regional Director

**cc: Charged Party
Other Parties
Attorney(s) or Representative(s) of record
General Counsel, Office of Appeals**